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No. 92-1292

In The

Supreme Court of the United States

October Term, 1992

LUTHER R. CAMPBELL a/k/a LUKE SKYYWALKER, CHRISTOPHER WONGWON a/k/a FRESH KID ICE, MARK ROSS a/k/a BROTHER MARQUIS, DAVID HOBBS a/k/a MR. MIXX; professionally known as THE 2 LIVE CREW; LUKE SKYYWALKER RECORDS,

Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF ON THE MERITS FOR PETITIONERS

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QUESTION PRESENTED

Whether Petitioners' commercial parody was a "fair use" within the meaning of 17 U.S.C. § 107.

PARTIES TO THE PROCEEDINGS

Petitioners:

Luther R. Campbell*
David Hobbs*
Mark Ross*
Christopher Wongwon*

Luke Skyywalker Records**

Respondent:

Acuff-Rose Music, Inc.

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* The 2 Live Crew

** The pleadings in this case do not reflect that the corporate name of the recording company has been changed to Luke Records, Inc.

** The corporate Petitioner has no parent or subsidiary companies.

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BRIEF ON THE MERITS FOR PETITIONERS

OPINIONS BELOW

The judgment of the United States District Court is reported at 754 F. Supp. 1150 (M.D. Tenn. 1991).

The judgment of the Sixth Circuit Court of Appeals is reported at 972 F.2d 1429 (6th Cir. 1992).

STATEMENT OF JURISDICTION

Title 28 U.S.C. § 1254(1) provides this Court's jurisdiction. The judgment of the Sixth Circuit Court of Appeals was entered August 17, 1992. Petitioners' motion for rehearing and rehearing *en banc* was denied October 26, 1992. A Petition for Writ of Certiorari was timely filed in this Court on Monday, January 25, 1993, and certiorari was granted March 29, 1993.

STATUTE INVOLVED

17 U.S.C. § 107 provides:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;

> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

STATEMENT OF THE FACTS

Roy Orbison and William Dees were the co-authors of a song entitled "Oh, Pretty Woman." In 1964, Orbison and Dees assigned their rights in "Oh, Pretty Woman" to the Respondent, Acuff-Rose Music, Inc. On August 26, 1964, Respondent registered "Oh, Pretty Woman" for copyright protection under Copyright Registration No. EP-191739.

The Petitioners, collectively known as 2 Live Crew, are a well-known rap music group. On July 5, 1989, the Petitioners' general manager wrote Acuff-Rose Music, Inc., informing it that 2 Live Crew had written a parody of "Oh, Pretty Woman" entitled "Pretty Woman." Petitioners advised Acuff-Rose that they intended to afford all credit for ownership and authorship of the song "Oh, Pretty Woman" to Acuff-Rose, Dees and Orbison, and offered to pay the mechanical statutory rate for its use. Petitioners enclosed a copy of the lyrics and a recording of the parody for Acuff-Rose's review. (Affidavit of Luther Campbell, J.A. 87). Acuff-Rose refused permission: "I am aware of the success enjoyed by 'The 2 Live Crews', but I must inform you that we cannot permit the use of a parody of 'Oh Pretty Women.' " (J.A. 89). The Petitioners released the album *As Clean As They Wanna Be*, which included the parody "Pretty Woman."

STATEMENT OF THE CASE

In June, 1990, Acuff-Rose filed suit alleging that 2 Live Crew willfully infringed and commercially exploited its rights in the song "Oh, Pretty Woman" under the United States Copyright Act, interfered with the Respondent's business relations, and interfered with the Respondent's prospective business advantage. (Complaint, J.A. 15-27).[1] The Petitioners, in response to the Complaint, filed a Motion to Dismiss with supporting affidavits from a parodist, Oscar Brand, from a music industry expert, William Krasilovsky, and from Luther Campbell. (J.A. 28-29, 39-80, 30-38, 93-98, 83-92). The attachments converted the Motion to Dismiss to a Motion for Summary Judgment under Rule 12(b), Fed. R. Civ. P. (J.A. 28-29).

The Petitioners, in accordance with Rule 67, Fed. R. Civ. P., deposited funds in the trial court, as if 2 Live Crew's version was a derivative work of the Respondent's copyrighted work. Petitioners calculated the deposited amount using the statutory mechanical rate in § 115 of the Copyright Act. (Motion to Deposit Funds, J.A. 81-82). The trial court granted the Motion.

Acuff-Rose filed affidavits of its agent and a musicologist. (Response to Motion to Dismiss, J.A. 105-144). The trial court concluded that the parties' affidavits left no material facts in dispute and addressed the case on summary judgment.

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1. Attached as Exhibit D to the Complaint was an audio cassette of "Oh, Pretty Woman" as recorded by Roy Orbison. Attached as Exhibit E to the Complaint was an audio cassette of "Pretty Woman" as recorded by the Petitioners. The Petitioners have lodged a copy of each audio cassette with this Court, so that a comparison of the two songs can be made. Exhibit B of the Complaint, a photocopy of the compact disc cover and compact disc, have also been lodged with the Court. In addition, Oscar Brand's sheet music comparison of the two songs has been lodged with the Court.

On January 14, 1991, the trial court granted 2 Live Crew's Motion for Summary Judgment and dismissed all three counts of the Respondent's Complaint. (J.A. 274-296). On October 2, 1991 the trial court returned the deposited funds and confirmed its fair use finding in favor of 2 Live Crew. (J.A. 335).

The Respondent appealed. (J.A. 339-40). The Court of Appeals for the Sixth Circuit reversed, over a dissent, and remanded to the trial court essentially with directions to grant summary judgment to Acuff-Rose. (J.A. 342-375). A Petition for Rehearing *en banc* was denied. (J.A. 376-77). Petitioners filed a timely Petition for Writ of Certiorari which was granted on March 29, 1993.

SUMMARY OF THE ARGUMENT

The recording at issue was a parody. It was produced for profit. The Sixth Circuit held "[T]he blatantly commercial purpose of the derivative work . . . prevents this parody from being a fair use." (J.A. 359). The Court rested its judgment on a sentence from *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984), restated in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985) that "every commercial use of copyrighted material is presumptively an unfair exploitation . . . ."

The Sixth Circuit erred by giving undue weight to the *Sony/Harper & Row* comment. The Sixth Circuit erred by not giving sufficient weight to "parody" as a genre which necessarily imitates, copies and borrows in order to criticize, satirize and entertain.

Sony and *Harper & Row* addressed piracy and plagiarism, not parody. They cannot fairly be read to make commercial use the decisive factor in a copyright case presenting the question of

whether a certain parody is a fair use under 17 U.S.C. § 107. That statute identifies four non-exclusive factors as the starting point for fair use analysis: (1) purpose and character of the use; (2) nature of the copyrighted work; (3) amount and substantiality of the portion used; (4) the effect of the use upon the potential market for the or value of the copyrighted work.

Of the statutory four, "effect on the market" is "undoubtedly the single most important element of fair use." *Harper & Row,* 471 U.S. at 566; *Stewart v. Abend,* 495 U.S. 207, 238 (1990). There was no evidence that 2 Live Crew's parody of "Oh Pretty Woman" adversely affected the existing or potential market for Roy Orbison's original song. That factor weighs heavily in favor of fair use, especially in a parody case.

The other statutory factors also favor fair use in this case. Parody has historically been accepted as fair use, and case law strongly supports its protection under the copyright laws. Parody is generally performed for commercial purposes, but its character as social commentary, even when commercial, cuts in favor of, not against, fair use. Thus the "purpose and character" factor strongly supports a fair use finding.

The "amount and substantiality" factor also favors the parody in this case. It borrowed enough only to conjure the image of the original work in the mind of the listener. It did not take "the heart of the book," *Harper & Row,* 471 U.S. at 564-65; it took only that which "a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point." *Elsmere Music,Inc. v. National Broadcasting Co.,* 623 F.2d 252, 253 n.1 (2d Cir. 1980).

Even the "nature of the copyrighted work" factor tips towards fair use in a parody case. Artistic and creative works are, of course, protected under copyright law. But parody, by definition, is the

comic imitation of writing in which the "language and style of an author or work is closely imitated for comic effect or in ridicule . . . ." Webster's Third New International Dictionary, Unabridged (1971). The 2 Live Crew's parody of "Oh Pretty Woman" flattered the creativity of the work by imitating it, exacting a fair use price which creative works must suffer under the First Amendment and the copyright laws' balanced efforts pursuant to Article I, § 8, "To promote . . . useful Arts," including parodies.

The Sixth Circuit's decision should be reversed, and the district court's finding of fair use affirmed.

ARGUMENT

PETITIONERS' PARODY WAS A FAIR USE WITHIN THE MEANING OF 17 U.S.C. § 107.

A. The Guiding Principles

The fair use doctrine, an exception to the law of copyright infringement, is an important and established rule of reason, guided, *but not limited* by four factors under 17 U.S.C. § 107: (1) the purpose and the character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; (4) the effect on the potential market for or value of the copyrighted work. *Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 560-561 (1985).

> Fair use was traditionally defined as "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent." H. Ball, Law of Copyright and Literary Property,

> 260 (1944) . . . . The statutory formulation of the defense of fair use in the Copyright Act reflects the intent of Congress to codify the common-law doctrine . . . . Section 107 requires a case-by-case determination whether a particular use is fair, and the statute notes four *nonexclusive* factors to be considered. This approach was "intended to restate the [pre-existing] judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H. R. Rep. No. 94-1476, p. 66 (1976).

Id. at 549. (emphasis supplied). Fair use is "a 'rule of reason' fashioned by judges to balance the author's right to compensation for his work, on the one hand, against the public's interest in the widest possible dissemination of ideas and information, on the other." ***Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.***, 626 F.2d 1171, 1174 (5th Cir. 1980).

The House Committee on the Judiciary, in an effort to define the general scope of fair use, identified seven examples of the kinds of use that are permitted. The Committee included and specifically identified "use in a parody of some of the content of the work parodied." U.S. House. Committee on the Judiciary, ***Copyright Law Revision (Part 1) Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law***, p. 24 Washington: Government Printing Office, July, 1961 (Y4.J89/1:C79/2). The Committee concluded that:

> Since the fair use doctrine may be applied in any number and variety of circumstances, it would be difficult to prescribe precise rules suitable for all situations. For example, the amount of work that may be properly used under that doctrine will vary according to the nature of the work, the essential character of

> the portion used, and the purpose and competitive effect of the use.
>
> Nevertheless, the doctrine of fair use is such an important limitation on the rights of copyright owners, and occasions to apply that doctrine arise so frequently, that we believe the statute should mention it and indicate its general scope. It seems anomalous to have the statute specify the rights of copyright owners in absolute terms without indicating that those rights are subject to the limitation of fair use.

Id. at 25.

The Petitioners' "Pretty Woman" was a parody of "Oh, Pretty Woman." The district judge wrote: "Acuff-Rose may not like it, and 2 Live Crew may not have created the best parody of the original, but nonetheless the facts convincingly demonstrate that it is a parody." (J.A. 281). The Court of Appeals accepted "that the purpose of the use was to parody the original." (footnote omitted). (J.A. 351). Circuit Judge Nelson, dissenting from the Sixth Circuit's conclusion that the parody was not fair use, framed the issue presented:

> Perhaps the most troublesome fair use issue of all is the question of whether a particular parody constitutes fair use of a copyrighted original. The parody cases appear to be in hopeless conflict.

(J.A. 360). This Court can resolve the conflict by recognizing parody's special place in art and literature, and by concluding that 2 Live Crew's commercial parody was fair use because, most importantly, it had no real effect "upon the potential market for or

value of the copyrighted work." 17 U.S.C. § 107(4).

> This last factor [§ 107(4)] is undoubtedly the single most important element of fair use. *See* 3 Nimmer § 13.05[A] at 13-76 and cases cited therein. "Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied." 1 Nimmer § 1.10[D] at 1-87.

Harper & Row, 471 U.S. at 566-67.

B. A Parody Is Presumptively Protected.

The parodist is an important part of European-American culture. The dictionary definition of "parody" reflects its roots:

> **par-o-dy** \'parade *also* 'per- or -di\ n -ES [L *parodia*, fr. Gk *paroidia*, fr. *para* beside + *oidia* (*fr. oeidein* to sing) — more at ODE] **1 a** : a writing in which the language and style of an author or work is closely imitated for comic effect or in ridicule often with certain peculiarities greatly heightened or exaggerated (these plays . . . are *parodies* of eighteenth century French farce —Claudia Cassidy> **b** : a literary style characterized by the reproduction of stylistic peculiarities of an author or work for comic effect or in ridicule (the dialogue . . . lapses now and then into inadvertent ≈ — Wolcott Gibbs> — compare BURLESQUE I **2** : a form or situation showing imitation that is faithful to a degree but that is weak, ridiculous, or distorted : a feeble or ridiculous imitation <a straggling ≈ of a military moustache —Fred Majdalany> <the . . . elite who live a ≈ of 19th century French culture —Alastair Reid> **3 a** : an imitation of a musical composition in which the original text or music has been altered usu. in a comical manner **b** : PARODY MASS syn see CARICATURE

Webster's Third New International Dictionary, Unabridged (1971).

Parody has historically been protected because of its important social and political significance as a form of expression which often communicates political views to the public. The parody is deeply rooted in our nation's history. These creative derivative works have historically been commercially sold and performed. "Yankee Doodle,"[2] "The Star Spangled Banner,"[3] and

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2. The origins of "Yankee Doodle" have been much debated by historians, but the most persuasive theory traces the song's beginnings to an English ditty, "Lucy Locket" (or "Fisher's Jig"). The "Yankee Doodle" lyrics were originally written (and the title supplied) by an English army surgeon as a comment on the ragtag character of colonial troops in the French and Indian War. But during the Revolutionary War, the lyrics were rewritten, in numerous verses and variations, as an anti-British song. Most variant uses, like "The Battle of the Kegs," a "harmonious ditty" by Francis Hopkinson (a signer of the Declaration of Independence) addressed specific current events — in that case a botched plan to blow up English ships in Philadelphia harbor. *See* Howard, John Tasker, *Our American Music: A Comprehensive History From 1620 to the Present*, Crowell (1965), pp. 37, 113-118; *See also*, Even, David, *Great Men of American Popular Song*, Prentice Hall (1970), p. 6.

3. The "Star Spangled Banner" began, circa 1775, as the marching song of London's Anacreontic Society, "To Anacreon in Heaven." Originally, the song was an ode to love and wine, with each stanza ending "And besides I'll instruct you, like me, to entwine/ The myrtle of Venus with Bacchus's vine." The first American parody of the song was published in New York in 1793 ("The genius of

(Cont'd)

"America" ("My Country 'Tis of Thee")[4] are all political song parodies, with American words put to popular English ballads of the day. The use of political, musical parodies has continued throughout the history of this country, including recent commercial radio station parodies on the 1991 Gulf War.[5]

Parody's historical importance as a form of social criticism and commentary requires a favorable fair use presumption as part of the fair use analysis. Since a parody is itself creative, it too must be afforded protection as fair use under the Copyright Act. The Petitioners' creative derivative work, admittedly a parody of the Respondent's copyrighted work, possesses the two fundamental criteria for copyright protection as defined by 17 U.S.C. § 102:

(Cont'd)

France from his star begem'd throne"), but the song soon thereafter became a vehicle for patriotic theses, such as "Sons of Columbia," "For the Glorious Fourth of July," "Union of the Gods," and "Freedom." The parody, "Adams and Liberty," helped boost the Federalist cause, while a few years later "Jefferson and Liberty" boosted the rival party. In the War of 1812, the melody was first used for "The Battle of the Wabash," and — as we know it today —in Francis Scott Key's "Defense of Fort McHenry." Howard, John Tasker, *Our American Music: A Comprehensive History From 1620 to the Present, op. cit.*, pp. 121-126.

4. "America" began with "Sally in My Alley," an English tavern song. An early suffragette adapted to it a poem entitled "Rights of Woman." The resulting song began, "God save each female's right/ Show to her ravish'd sight/ Woman is free." Shortly thereafter, the melody produced the English patriotic standard, "God Save the King." In 1831, Samuel Francis Smith used it for "America." *Id.* at 126-128.

5. In the first two months after Iraq's invasion of Kuwait, more than a dozen parodies appeared on the airwaves, including "Hussein is Crazy" (to "She Drives Me Crazy"), "Iraquity-Rag" (to "Yackety-Yak"), "Iraq and a Hard Place" (to "A Rock and a Hard Place"), and "Iraqi Blues" (to 'Summertime Blues"). All of these songs were written and produced by disk jockeys at commercial radio stations, and given air time on those stations alongside commercial songs. Baltimore Sun, "Song Parodist Aims Poison-Pen at Iraq," August 23, 1990.

"originality" and "fixation in tangible form." Therefore, like the copyrighted work, the Petitioners' parody has artistic importance and sufficient "originality" to warrant some protection under the Copyright Act of 1976. A presumption of fair use, or the requirement that parodistic efforts be given substantial weight as part of the fair use equation, sets the proper stage for judging copyright cases concerned with parodies.

The trial court, on undisputed facts, determined, that the Petitioners' creative derivative work of parody constituted "fair use," applying the four statutory factors in 17 U.S.C. § 107. The undisputed facts, and the law in this case, compel the conclusion that 2 Live Crew's "Pretty Woman" meets the fair use test under the four statutory factors, and the unenumerated "parody" factor. The importance of the parody genre is central to review of the statutory factors.[6]

C. An Analysis of the Factors in 17 U.S.C. § 107 Supports the Trial Court's Determination that the Petitioners' Parody Constitutes Fair Use of the Respondent's Copyrighted Work.

1. Purpose and Character of Use

The issue presented is "whether Petitioners' commercial parody was a 'fair use' within the meaning of 17 U.S.C. § 107." Order granting certiorari, 113 S. Ct. 1642, March 29, 1993. The purpose and character of a parody is to imitate. The trial court, the appellate court, and even the Respondent's agent, when denying permission to 2 Live Crew, characterized the Petitioners' creative derivative work as a "parody." Judge Nelson's dissent said:

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6. The Sixth Circuit recognized parody's privilege: "[W]e find that the term parody must be either subsumed within the statutory terms 'criticism' or 'comment' or be an entirely separate category of exception." (J.A. 350-51). The majority simply did not afford parody its proper weight in the statutory analysis.

> I am satisfied that the 2 Live Crew version both imitates and distorts the original work for comic or satiric effect, and does so in such a way that both the original work and the work of the parodist are readily recognizable. The parody (done in an African-American dialect) was clearly intended to ridicule the white bread original — and if a higher criticism is necessary to qualify the derivative work as true parody, such criticism is readily discernable.

(J.A. 365). Judge Nelson continued, after comparing the themes of the two works:

> This, I should say, is "criticism" with a vengeance — and the thematic relationship to the original is obvious. The relationship between the copyrighted song and the parody is every bit as patent as was the corresponding relationship between the songs considered by the courts in *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y. 1980) aff'd 623 F. 2d 252 (2nd Cir. 1980). That case involved an oft-repeated advertising jingle known as "I Love New York" and a Saturday Night Live take-off entitled "I Love Sodom." The parody was held to constitute a fair use of the original. The statutory factors, in my view, fully support a corresponding result in the instant case.

(J.A. 366-67).

Even the majority accepted (with reservation) "the district court's conclusion that the purpose of the use was to parody the

original." (J.A. 351). The majority acknowledged that parody, prior to the codification by Congress, had long been a recognized exception of the common law "fair use" doctrine. In *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2nd Cir. 1964), Judge Kaufman wrote:

> For, as a general proposition, we believe that parody and satire *are* deserving of substantial freedom — both as entertainment and as a form of social and literary criticism. As the readers of Cervantes' "Don Quixote" and Swift's "Gulliver's Travels" or the parodies of a modern master such as Max Beerbohm well know, many a true word is indeed spoken in jest.

(Emphasis in original).

Parody's character and use as political and social commentary weighs heavily in favor of fair use. While we suggest a presumption in favor of fair use if a creative derivative work can be characterized as a parody (with the copyright owner relying upon the statutory factors and other relevant information to attempt to rebut the fair use presumption), under any construct this parody is entitled to claim its full allowance of fair use freedom under subsection (1) of § 107.

The Petitioners' request for permission to parody "Oh, Pretty Woman," their offer of statutory fees, and the rejection of that offer, buttresses our argument.[7]

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7. Petitioners' deposit of the statutory fee was an attempt to recognize the balance between the copyright owner's statutory right to compensation and the public's right to access copyrighted works. Respondent's rejection of remuneration was a rejection by the Respondent of the Petitioners' right to freedom of expression.

In certain circumstances a derivative work must pay a statutory rate for its use of the copyrighted work. 17 U.S.C. § 115. However, if the derivative work is creative and distinguishable from the copyrighted work, such as a parody, then the use constitutes fair use and no payment is required under 17 U.S.C. § 107. One of the reasons why payment is not required is because the copyright owner will likely resent and object to the parody, and as in the case at bar, may even refuse payment from the parodist. It is in part the "originality" that the copyright owner objects to as well as the "criticism" and "comment" of the copyrighted work.

Scores of companies, groups, and individuals write, perform, and record political parody songs of copyrighted material. These range from the nationally televised Saturday Night Live [see *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980)], to lesser known local groups which charge for admission, and/or sell audio tapes of their performances.[8] Few, if any, of these groups and individuals seek or obtain permission for their parodies. Further, it is highly unlikely that the copyright owners would grant permission if requested. *See* Appendices to Capitol Steps Productions, Inc. and Mark Russell Motion for Leave to File Brief Amicus Curiae in Support of Petitioners. The Petitioners should be lauded, not punished, for seeking permission prior to releasing their parody. In *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986), the United States Court of Appeals for the Ninth Circuit commented:

> Fisher and Segel fault Dees for using the song after Fisher expressly refused him permission

8. These include Minnesota Public Radio's "Prairie Home Companion" and "American Radio Theater," Oregon's "Summer Angels," the "Bushwackers" of Oberlin College, Ohio, the "Last Chance Dixieland Jazz Bank" of Helena, Montana, and Washington, D.C.'s "Hexagon," and "Mrs. Foggybottom and Her Friends."

> to do so. In their view, this shows bad faith on Dees's part. We cannot agree. Parodists will seldom get permission from those whose works are parodied. Self-esteem is seldom strong enough to permit the granting of permission even in exchange for a reasonable fee. *See* Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 Harv.L.Rev. 1395, 1397 n. 12 (1984) .... The parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought. *See* 3 M. Nimmer, *supra*, Section 13.05[C], at 13-89; Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 Colum.L.Rev. 1600, 1633 & n. 177. Moreover, to consider Dees blameworthy because he asked permission would penalize him for this modest show of consideration. Even though such gestures are predictably futile, we refuse to discourage them.

The second aspect of the first factor of 17 U.S.C. § 107 is the "character of use, including whether such use is of a commercial nature or is for non-profit educational purposes." This Court, when it reworded the question presented, clearly focused on the commercial nature of the use. The court below was persuaded that commercial use meant unfair use, relying on its interpretation of *Sony Corp.*, 464 U.S. 417, and *Harper & Row*, 471 U.S. 539.

In both *Sony* and *Harper & Row*, this Court stated that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of

the copyright." *Sony Corp.*, 464 U.S. at 451; *Harper & Row, Publishers, Inc.*, 471 U.S. at 562. The Court of Appeals for the Sixth Circuit both misapplied the presumption to a creative derivative work such as a musical parody, and strengthened the presumption in a context far different from that presented in each of those cases. Justice Brennan, dissenting in *Harper & Row,* predicted that the commercial use presumption created in *Sony* would be misapplied and misused to limit the dissemination of creative derivative works.

> Protection of the copyright owner's economic interest is achieved in this case through an exceedingly narrow definition of the scope of fair use. The progress of arts and sciences and the robust public debate essential to an enlightened citizenry are ill served by this constricted reading of the fair use doctrine. See 17 U.S.C. § 107.

471 U.S. at 579 (Brennan, J., dissenting).

Justice Brennan later noted in his dissenting opinion:

> The Court's reliance on the commercial nature of The Nation's use as "a separate factor that tends to weigh against a finding of fair use," *ante*, at 562, is inappropriate in the present context. Many uses § 107 lists as paradigmatic examples of fair use, including criticism, comment, and *news reporting*, are generally conducted for profit in this country, a fact of which Congress was obviously aware when it enacted § 107. To negate any argument favoring fair use based on news reporting or criticism because that reporting or criticism

> was published for profit is to render meaningless the congressional imprimatur placed on such uses.

Id. at 592 (emphasis in original).

Until the decision below, the dominant forces in shaping the fair use doctrine as it pertained to musical song parodies had been the Second and Ninth Circuit Courts of Appeal. This was a case of first impression in the Sixth Circuit. (J.A. 351).

The Second and Ninth Circuits, in a series of decisions including *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2nd Cir. 1964); *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); and *Elsmere Music Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2nd Cir. 1980), have long provided an interpretation of 17 U.S.C. § 107 which draws a careful distinction between the parody of a musical work and the plain piracy of that work for commercial gain. These decisions had been the benchmarks which guided composers and performers using parodies of copyrighted works. Neither *Sony* nor *Harper & Row* supports the Sixth Circuit's view that "commercial use" outweighs the parody purpose of the use.

Sony involved verbatim copying of the copyrighted work by non-parties to the suit — VCR owners. *Harper & Row* involved the reporting of portions of an unpublished manuscript by a direct competitor of the licensor. Neither case examined the fair use doctrine as applied to a creative derivative work such as a musical parody. Nor did they address a case in which a parodist sought permission and offered compensation to the copyright holder. However, *Harper & Row's* insights into "character of the use" supports Petitioners' position, given their offer to pay Acuff-Rose.

> Also relevant to the "character" of the use is "the propriety of the defendant's conduct." 3

> Nimmer § 13.05[A] at, 13-72. "Fair use presupposes 'good faith' and 'fair dealing.' " *Time Inc. v. Bernard Geis Associates*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968), quoting Schulman, *Fair Use and the Revision of the Copyright Act*, 53 Iowa L.Rev. 832 (1968). . . . Fair use "distinguishes between 'a true scholar and a chiseler who infringes a work for personal profit'."

Harper & Row, 471 U.S. at 562-63 (citation omitted).

Parody and all forms of social criticism are generally commercial. A written parody may appear in a periodical which either receives remuneration from the general public for the purchase and/or from advertisers who support the distribution of the periodical. Television and radio parodies are available to the public because advertisers purchase air time from the station and/or television network, or because the viewers purchase the cable programming. Even a street performer who performs a parody of a copyrighted work usually passes a hat around to the audience to support his or her existence. Commercial use is only a starting point for determining whether a parody is a fair use.

The decision below created an unreasonable presumption against a finding of fair use for a commercial parody. If allowed to stand, it will have a chilling effect on parody in this country. *See* Capitol Steps Productions, Inc. and Mark Russell's Motion For Leave To File Brief of Amicus Curiae in Support of Petitioner.

The facts and holdings in *Sony* and *Harper & Row* are easily distinguishable from this case. Here, the decision should be that no presumption exists against a finding of fair use for a commercial parody. A rebuttable presumption in favor of fair use, if a creative derivative work can be defined as a parody, is a fairer approach to

the statutory and historical protections sought by the copyright laws. As stated in *Harper & Row* in another context, the commercial nature of a derivative work merely "tends to weigh against a finding of fair use." 471 U.S. at 562. The decision below went too far when it held that "it is the blatantly commercial purpose of the derivative work that prevents this parody from being a fair use." (J.A. 359). That view was unsupported by any fair analysis of the facts and the relevant law.

2. The Nature of the Copyrighted Work

Judge Nelson's dissent viewed the creative nature of the copyrighted work as important, but not controlling because parodies tend to mock widely recognized copyrighted works known to the public. It would defeat the purpose of the parody if its intended audience did not recognize the copyrighted work parodied. Judge Nelson wrote:

> The pertinent data in this connection are that Orbison and Dees published "Oh, Pretty Woman" long before the alleged infringement occurred, and that theirs is a work of the imagination rather than a piece of historical reportage.
>
> That the original song had long since been published is a factor which works in favor of the 2 Live Crew defendants. *See Harper & Row*, 471 U.S. at 564, where the Supreme Court declared that "the scope of fair use is narrower with respect to unpublished works." The fact that "Oh, Pretty Woman" is a creative work might tend to offset the publication factor, perhaps, if the work were not being used for the purpose of parody. But parody routinely sets its

> sights on the fictive as opposed to the factual. If, as the Second Circuit insists, "parody and satire are deserving of substantial freedom," *Berlin*, 329 F. 2d at 545, it would make no sense at all to penalize the parodist for taking as his subject precisely the sort of work that has been grist for parodists' mills for the last two and a half millennia.

(J.A. 369).

Article I, § 8 of the Constitution gives Congress power to promote "useful Arts." The copyright laws seek to achieve that purpose both by providing exclusive rights to authors, and by incorporating a "fair use" exception to those rights. That recognition seeks to expand, not contract, creativity. Thus an artist who has achieved a modicum of success must pay a fair price — the ability to suffer imitation, criticism, or parody with a smile:

> [A]ny work of sufficient notoriety to be the object of parody has already secured for its proprietor considerable financial benefit. According that proprietor further protection against parody does little to promote creativity but it places a substantial inhibition upon the creativity of authors adept at using parody to entertain, inform, or stir public consciousness.

Warner Brothers, Inc. v. American Broadcasting Companies, Inc., 720 F.2d 231, 242-243 (2d Cir. 1983).

Consequently, the creative nature of the Orbison-Dees work does not insulate it from fair use. On the factual record of this case, 2 Live Crew's parody does not offend the "nature of the work" statutory factor.

3. The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

The district court recognized that "this element contains quantitative and qualitative elements and as a result the amount of protected material that a copier may take under the rubric of fair use will vary from case to case." (J.A. 283).

The Sixth Circuit concurred:

> Parodies are generally allowed to use more of the copyrighted work and still fall within the rubric of fair use than are other types of copying:
>
> [T]he concept of "conjuring up" an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. A parody is entitled at least to "conjure up" the original. *Elsmere*, 623 F.2d at 253 n. 1 (citation omitted).

(J.A. 355).

The dissent said:

> The "portion used" test is problematical in this context because parody cannot be parody unless it allows the original work to shine through in a form which, while distorted, is recognizable. "Parody by its nature demands close imitation," Bisceglia, "Parody and Copyright Protection," ASCAP Copyright

> Law Symposium No. 34 at 17; substantial usage is then almost a given.

(J.A. 370).

In *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986), the court held that determining whether or not the parodist exceeded the amount which could be taken from the original work depended upon the medium of the respective work. " '[W]hen the medium involved is a comic book, a recognizable caricature is not difficult to draw, so that an alternative that involves less copying is more likely to be available than if a speech, for instance, is parodied.'" *Id.* at 439 (quoting *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978)). The court concluded:

> Like a speech, a song is difficult to parody effectively without exact or near-exact copying. If the would-be parodist varies the music or meter of the original substantially, it simply will not be recognizable to the general audience. This "special need for accuracy" provides some license for "closer" parody. *See id.* To be sure, that license is not limitless: the parodist's desire to make the best parody must be "balanced against the rights of the copyright owner in his original expression." *Id.* We think the balance tips in the parodist's favor here. In view of the parody's medium, its purposes, and its brevity, it takes no more from the original than is necessary to accomplish reasonably its parodic purpose.

794 F.2d at 439 (footnote omitted).

In *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956),

affirmed by an equally divided court *sub nom. Columbia Broadcasting System, Inc. v. Loew's, Inc.*, 356 U.S. 43 (1958), Jack Benny's half-hour television burlesque of the movie "Gaslight" was viewed as a copyright infringement. The central determination in that decision was that the burlesque took substantially from the original. In *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348, 350 (S.D.Cal. 1955), the same district judge in the Jack Benny case held that a Sid Caesar/Imogene Coca television burlesque, "From Here to Obscurity," did not infringe the copyright of the movie, "From Here to Eternity," nor did the telecast constitute unfair competition to the movie. The court distinguished its holding in *Benny v. Loew's:*

> Unlike *Loew's*, here there was a taking of only sufficient [sic] to cause the viewer to recall and conjure up the original. This is a necessary element of burlesque. As Dr. Baxter stated at the trial of *Loew's Incorporated v. Columbia Broadcasting System, Inc.*, the defendant has taken a small part and then " '[taken] off into the blue.' " 137 F. Supp. at 351.

The undisputed facts in this case support the same conclusion. Luther Campbell said:

> In writing the parody I felt it was necessary for the listener to identify the parody version with the original version . . . . I chose to include the distinctive introduction of the original version of "Oh Pretty Woman" and the first line of lyrics because I felt this was sufficient for the listeners to identify the parody with the original work.

(J.A. 84).

Oscar Brand, an expert in musical parodies, said:

> In sum, the music on 2 Live Crew's "Pretty Woman" uses just enough material from the Orbison composition to create a very sophisticated comic parody of the original song.

(J.A. 32-33).

The Acuff-Rose musicologist did not contest that conclusion. (J.A. 138-41).

Other cases lend support to the difference parody makes when judging amount and substantiality. *Bloom & Hamlin v. Nixon*, 125 F. 977, 978 (USCC Pa. 1903) found that the singing of the chorus of a copyright song, "Sammy" from the Wizard of Oz" was not an infringement when sung by one mimicking the star of the show. The court held that the chorus of the song was "a mere vehicle for carrying the imitation along" and did not constitute an infringement.

In *Berlin v. E.C.Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964), the plaintiffs alleged that Mad Magazine, by compiling a "collection of parody lyrics to 57 old standards which reflect the idiotic world we live in today," infringed upon the copyrights held by the original works. *Id.* at 543. The parody lyrics were written in the same meter as the original lyrics."A Pretty Girl is Like a Melody" was reconstituted into "Louella Schwartz Describes Her Malady." The Court of Appeals affirmed the dismissal of the original song publisher's claims of infringement:

> We believe in any event that the parody lyrics involved in this appeal would be permissible under the most rigorous application of the

> "substantiality" requirement. The disparities in theme, content and style between the original lyrics and the alleged infringements could hardly be greater. In the vast majority of cases, the rhyme scheme of the parodies bears no relationship whatsoever to that of the originals. While brief phrases of the original lyrics were occasionally injected into the parodies, this practice would seem necessary if the defendants' efforts were to "recall or conjure up" the originals; the humorous effect achieved when a familiar line is interposed in a totally incongruous setting, traditionally a tool of parodists, scarcely amounts to a "substantial" taking, if that standard is not to be woodenly applied. Similarly, the fact that defendants' parodies were written in the same meter as plaintiffs' compositions would seem inevitable if the original was to be recognized, but such a justification is not even necessary; we doubt that even so eminent a composer as plaintiff Irving Berlin should be permitted to claim a property interest in iambic pentameter.
>
> In short, we believe that whatever use was made of the plaintiffs' works in this case fell far short of the "substantial" takings which were involved in Benny, even if we were to find the rationale of that opinion persuasive. While the social interest in encouraging the broad-gauged burlesques of Mad Magazine is admittedly not readily apparent, and our individual tastes may prefer a more subtle brand of humor, this can hardly be dispositive here. *Cf. Bleistein v. Donaldson Lithographing*

Co., 188 U.S. 239, 47 L.Ed. 460 (1903). For, as a general proposition, we believe that parody and satire *are* deserving of substantial freedom — both as entertainment and as a form of social and literary criticism. As the readers of Cervantes' "Don Quixote" and Swift's "Gulliver's Travels" or the parodies of a modern master such as Max Beerbohm well know, many a true word is indeed spoken in jest. At the very least, where, as here, it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to "recall or conjure up" the object of his satire, a finding of infringement would be improper.

329 F.2d at 545 (emphasis in original).[9]

Elsmere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980), found that a skit on the television program Saturday Night Live which "poked fun at New York City's public relation campaign and its theme song," did not constitute copyright infringement. The Plaintiffs had alleged that the parody "I Love Sodom" infringed on their copyright of the song "I Love New York." The District Court summarized the parody:

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9. In *Berlin* the court emphasized the failure by the plaintiffs to "indicat[e] with any degree of particularity the manner in which [commercial] injury might have been inflicted" and found that this tended to weaken the plaintiffs' claims. 329 F.2d at 543. The Respondent in its supporting affidavits has also failed to state with any particularity how the Petitioners' use has caused any proximate injury. *See* discussion, *infra* at pp.31-38.

> The song "I Love Sodom," as well as the sketch of which it was a part, was clearly an attempt by the writers and cast of SNL to satirize the way in which New York City attempted to improve its somewhat tarnished image through the use of a slick advertising campaign.

482 F. Supp. at 745.

The Second Circuit affirmed *per curiam* "on Judge Goettel's thorough opinion," 623 F.2d at 253, and appended an enlightening footnote:

> The District Court concluded, among other things, that the parody did not make more extensive use of appellant's song than was necessary to "conjure up" the original. 482 F.Supp. at 747. While we agree with this conclusion, we note that the concept of "conjuring up" an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348, 354 (S.D.Cal. 1955). A parody is entitled at least to "conjure up" the original. Even more extensive use would still be fair use, provided the parody *builds upon the original*, using the original as a known element of modern culture *and contributing something new for humorous effect or commentary.*

Id. n. 1 (emphasis added).

The trial court in this case compared the two "Pretty Women" and concluded that 2 Live Crew took only that which was necessary to make their parody point:

> Acuff-Rose argues that the portions taken from "Oh, Pretty Woman" are both qualitatively and quantitatively significant. According to the plaintiff's musicologist, Earl V. Speilman, the two works are substantially similar. The copying includes the name of the song and key lyrics. The 2 Live Crew version also includes the same guitar refrain, opening drum beat and melody and chorus. Affidavit of Earl V. Speilman. Since the original song is so popular, Acuff-Rose contends that 2 Live Crew does not need to copy much of the original in order to conjure up its memory.
>
> But the conclusion drawn by the plaintiffs does not address whether 2 Live Crew used more of the copyrighted work than was necessary to recall or conjure up "Oh, Pretty Woman." *See, e.g., Fisher,* 794 F.2d at 438 n. 4 (holding that affidavits conflicting on question of substantiality are irrelevant given that issue of extent of taking is a question of law). No one disputes that 2 Live Crew copied "Oh, Pretty Woman." But the question about substantial similarity cannot be divorced from the purpose for which the defendant's work will be used.

(J.A. 284).

The trial court decided:

> In this case, 2 Live Crew has not mimicked so much of "Oh, Pretty Woman" that it runs afoul of the substantiality factor. Notable aspects of the original song are plainly present in 2 Live Crew's version but, unlike *Air Pirates,* this is not a case of virtually complete or verbatim copying. Rather this case falls in the realm of parodies envisioned by *Fisher* and *Berlin.* In view of the fact that the medium is a song, its purpose is parody, and the relative brevity of the copying, it appropriates no more from the original than is necessary to accomplish reasonably its parodic purpose. *Fisher,* 794 F.2d at 439.

(J.A. 286).

The Court of Appeals apparently concluded this factor was a draw. It concluded that the relevant facts "cannot be used in any way to support a finding of fair use." (J.A. 357). But neither did the court find that the portion used cut against fair use. That approach is inconsistent with the cases recognizing a parody's need to copy. When parody is added to the "amount and substantiality" factor, 2 Live Crew prevails on this point too.

4. Effect on the Market

The Court has acknowledged that this factor is "undoubtedly the single most important element of fair use." *Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 566 (1985). It is the " 'most important, and indeed central fair use factor.' 3 Nimmer § 13.05 [A], p. 13-81;" *Stewart v. Abend,* 495 U.S. 207, 238 (1990).

Judge Nelson's dissent below carefully examined the

affidavits presented by the parties, which constituted the only effect on the market evidence before the trial court. He concluded:

> To me, at least, it seems as clear in this case as it did to the Second Circuit in *Berlin* that "the parody has neither the intent nor the effect of fulfilling the demand for the original . . . ." 329 F.2d at 545.

The affidavit of Oscar Brand says that

> "Parodies have never interfered with the popularity of the original. * * * The sales graph of 'Hello, Dolly' didn't change when it became 'Hello, Lyndon' and 'Hello, Nixon.' Hundreds of popular songs have been 'covered' by parody performances and recordings without altering their popular appeal or interfering with their sales."

Although Brand's assertion that parodies have "never" interfered with the popularity of the original strikes me as dubious, there has been no showing of any such interference here. Brand — who is probably on firmer ground when he sticks to the specifics of this case — explains that the audiences for the two songs are quite different:

> There is no question in my mind that the song "Oh, Pretty Woman" by Roy Orbison and William Dees was intended for Mr. Orbison's country music audience and middle-America.

> On the other hand, 2 Live Crew's version, which is unquestionably a comic parody, is aimed at the large black populace which used to buy what was once called 'race' records. The group's popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original."

Brand's analysis of the market stands unrefuted. One month after Brand gave his affidavit, the plaintiff's Director of Licensing, Gerald Teifer, executed an affidavit in which there is no attempt to deny that the two songs are aimed at different markets. Mr. Teifer does suggest, however, that the 2 Live Crew parody could impair the value of the plaintiff's right to grant licenses to parodists. And Mr. Jerry Flowers, Executive Director of Publishing for the plaintiff's parent corporation, says in an affidavit that the licensing of parodies of established hit songs has become extremely lucrative.

(J.A. 372-73).[10]

Petitioners' Krasilovsky affidavit supported Brand, the district court and the dissent. Mr. Krasilovsky stated: "In other

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10. Judge Nelson distinguished the licensing of parodies from interference with the primary market, and noted the potential for copyright censorship if only licensed parodies were permitted. (J.A. 374). We discuss, *infra* at 35-37, the fallacy of letting future parody licensing govern the fair use analysis.

words, the record collector seeking the original composition would be highly unlikely to purchase or tune into the 2 Live Crew version." (J.A. 95).

Bass music, the regional style of hip hop music played by the 2 Live Crew, was created in the Liberty City area of Miami, where the group's leader, Luther Campbell, began his career. The parody created by the Petitioners was intended for a specific audience, young urban blacks. The purpose of the parody was to mock the banality of white centered rock-n-roll music by attacking one of its time honored ballads. (J.A. 34). The intended market for the parody was as different from that of the copyrighted work as black and white.

The trial court in this case concluded:

> With respect to the parody "Pretty Woman," this fourth factor favors the defendants. As in *Fisher,* it is extremely unlikely that 2 Live Crew's song could adversely affect the market for the original. The intended audience for the two songs is entirely different. The odds of a record collector seeking the original composition who would also purchase the 2 Live Crew version are remote. Defendants' Affidavit of William Krasilovsky. "The group's popularity is intense among the disaffected, definitely not the audience for the Orbison song. I cannot see how it can affect the sales or popularity of the Orbison song, except to stimulate interest in the original." Defendant's Affidavit of Oscar Brand. Second, while Acuff-Rose is not required to prove damages, *Marcus v. Rowley,* 695 F. 2d 1171, 1177 (9th Cir. 1983), it has not produced

> convincing evidence that any harm to any existing or potential market has occurred.

(J.A. 288).

The trial court echoed *Elsmere:*

> The song has not affected the value of the copyrighted work. Neither has it had — nor could it have — the "effect of fulfilling the demand for the original." *Berlin v. E.C. Publications, Inc., supra,* 329 F.2d at 545. Just as imitation may be the sincerest form of flattery, parody is an acknowledgement of the importance of the thing parodied. In short, the defendant's version of the jingle has not in the least competed with or detracted from plaintiff's work.

Elsmere Music, Inc. v. National Broadcasting Co., supra, 482 F. Supp. at 747.

The opinion below misapplied the "effect on the market" factor because it failed to focus on the potential market of the original copyrighted work. Instead, the court focused on the harm which it perceived the Petitioners' creative derivative work might cause to the market for licensing future potential parodies of "Oh, Pretty Woman." (J.A. 357-58). If the Sixth Circuit had concentrated its analysis on the parody's effect on the potential market of the original copyrighted work, it could only have reached the conclusion that this most important factor favors a finding of fair use.

Acuff-Rose contended that the Petitioners' parody precluded Acuff-Rose from developing its own parody of "Oh Pretty

Woman" although offering no reasonable expectation of criticizing or mocking its own rock-n-roll ballad. Nevertheless, the Court of Appeals accepted the argument. (J.A. 357-58). That precedent means every parody, commercial or otherwise, could be defeated in a fair use case by the copyright owner simply asserting its intent to release a future parody of its own original work.

The district judge rejected that idea:

> Plaintiffs attempted to focus on their possible future losses and mount two different arguments. First, they contend that 2 Live Crew's parody prevents them from marketing future derivative works, such as a rap version or even their own "burlesque" of the Orbison original. Second, they argue that "Oh, Pretty Woman" "has been tarnished by being associated with these lyrics and with 2 Live Crew" and that will result in the loss of future licensing arrangements.
>
> Since 2 Live Crew's version of "Oh, Pretty Woman" is a parody, that release has not prevented Acuff-Rose from recording whatever version of the original it desires. Likewise, plaintiff's argument that it would be prevented from releasing a parody of their work is meritless. In a world where copyright monopoly stretched to that great extent, parodies would be unlikely ever to be approved by the original author. See 3 Nimmer, *Nimmer on Copyright*, § 13.05[C] at 13-90. 12; *Fischer*, 794 F. 2d at 437 (Parodist will seldom get permission from those whose works are parodied. . . . The parody defense to copyright

> infringement exists precisely to make possible a use that generally cannot be bought.")

(J.A. 289).

Judge Nelson's Sixth Circuit dissent concurred with the trial court:

> Parody, again, is different. It transforms as it copies, and it may well savage the original work in the process. In the past, at least, copyright holders have not been overly enthusiastic about agreeing to see their works parodied — and the law itself has licensed parodists, much as the law has given license to book reviewers, drama critics, and other commentators. Ours is a commercial age, to be sure, and consensual "parody licenses" may be more common now than they used to be. I confess that I am still uneasy, however, about the prospect of the courts turning copyright holders into censors of parody. Neither the history of the fair use doctrine nor the four factors enumerated in the Copyright Act compel such a result. "[P]ermissible parody, whether or not in good taste, is the price an artist pays for success . . . ." *MCA, Inc. v. Wilson*, 677 F. 2d 180, 191 (2nd Cir. 1981) (Mansfield, J., dissenting).

(J.A. 374).

The Petitioners' creative derivative work, unlike *Sony* and *Harper & Row*, did not involve verbatim copying which could harm the market for the original product. The Petitioners created a

separate and distinct creative work which is entitled to protection under the Copyright Act. In *Sony*, the verbatim copying was intended to supplant the copyrighted work by simply altering the availability of the original copyrighted work as to when the public could view the copyrighted work. Nevertheless, this Court found "fair use." In *Harper & Row*, the heart and soul of the unpublished copyrighted work was presented in the guise of a book review. The substantial taking directly competed with the copyrighted work because, as a direct and proximate result of its publication, Time Magazine, the licensor of the unpublished work, terminated its licensing agreement to publish excerpts and failed to pay the balance of the licensing fee. The publication by Nation Enterprises did not constitute "fair use" precisely because it *did* adversely affect the potential market of the copyrighted work.

There is no evidence in this record that the Petitioners' creative derivative work has adversely affected either the existing market and/or a potential market for the Respondent's copyrighted work. Thus, on this most important factor, the 2 Live Crew prevails.

CONCLUSION

The Petitioners' commercial parody constitutes "fair use" of the Respondent's copyrighted work. The first factor of 17 U.S.C. § 107, the purpose and character of the use, favors the Petitioners because their creative derivative work is a parody. The second factor, the nature of the copyrighted work, favors the Petitioners because parody must be built on the original creator's accomplishments. The third statutory factor, the amount and substantiality of the portion used, favors the Petitioners because they used only that amount necessary to "conjure up" the copyrighted work. Finally, the fourth and determinative statutory factor favors the Petitioners because the Petitioners' creative derivative work does not substitute for the copyrighted work nor

does it adversely affect the future marketability of the copyrighted work.

A careful analysis of the four factors articulated in 17 U.S.C. § 107 supports a finding that the Petitioners' creative derivative work did constitute "fair use." When the social and historical importance of artistic parody is factored into the "fair use" equation, use of the parody genre, even if commercial, is presumptively fair.

The Court should reverse the decision of the United States Court of Appeals for the Sixth Circuit and reinstate the trial court decision that, as a matter of fact and law, the Petitioners' parody constitutes "fair use."

Respectfully submitted,

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